Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1973

NO. 73-1475

HARRIS COUNTY COMMISSIONERS COURT, ET AL, *Appellants*

v.

RICHARD E. MOORE, ET AL, *Appellees*

On Appeal From The United States District Court For The Southern District of Texas, Houston Division

BRIEF FOR THE APPELLEES

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SUBJECT INDEX

	Page
Order and Opinion Below	1
Jurisdiction	2
Statute Involved	2
Question Presented	4
Statement	4
Summary of Argument	7
I. History of the Texas Law Regarding Justices of the Peace and Constables	9
II. Federal Constitutional Guarantees are Offered When the State Statute in Question is Applied	14
III. The District Court Acted Correctly in Refusing to Apply the Abstention Doctrine Below	24
IV. No Adequate Remedy Exists for Appellees Under Texas Law	32
Conclusion	34
Certificate of Service	35
Appendix Index	37

LIST OF AUTHORITIES

CASES

	Page
Avery v. Midland County, Texas, 88 S.Ct. 1114	5, 17, 18
Baker v. Carr, 82 S.Ct. 691 (1962)	28
Bates v. City of Little Rock, 80 S.Ct. 412	21, 22
Brown v. Meeks, 96 S.W.2d 839 (Tex. Civ. App. 1936, error dismissed)	13
Carrington v. Rash, 85 S.Ct. 775 (1965)	20, 21
Davis v. Mann, 84 S.Ct. 1441	20
Ehlinger v. Rankin, 29 S.W. 241 (1895)	9
Ex rel. Dowlen v. Rigsby, 43 S.W. 1101 (Tex. S.Ct. 1897)	11, 13
Gray v. Sanders, 83 S.Ct. 801	17
Hastings v. Townsend, 136 S.W. 1143 (Tex. Civ. App. 1911, no writ history)	13
Maryland Casualty Company v. Pacific Coal & Oil Co., 61 S.Ct. 510 (1941)	26
Massachusetts v. Burkhart, 207 F.Supp. 885, 893	17
Mayor of Savannah v. Savannah Distributing Co., Inc., 43 S.E.2d 704	15

CASES

	Page
McLaughlin v. State of Florida, 85 S.Ct. 283	21
Meredith v. Sharp, 256 S.W.2d 870 (Tex. Civ. App. 1953, error refused, n.r.e.)	13
N.A.A.C.P. v. Alabama ex rel. Flowers, 1964, 84 S.Ct. 1302	22
N.A.A.C.P. v. Bennett, 79 S.Ct. 1192	26, 27
N.A.A.C.P. v. Button, 1963, 83 S.Ct. 328	22
Powell v. State of Alabama, 53 S.Ct. 55	22
Railroad Commission of Texas v. Pullman Company, 61 S.Ct. 643	25, 26
Reynolds v. Sims, 84 S.Ct. 1362	20, 22
Roman v. Sincock, 84 S.Ct. 1449	20
Schneider v. State of New Jersey, Town of Irvington, 60 S. Ct. 146	21
Shelton v. Tucker, 1960, 81 S.Ct. 247, 252	23, 24
Snyder v. Com. of Massachusetts, 54 S.Ct. 330	21
State v. Erickson, 225 Iowa 1261, 282 N.W. 728	15
State v. Rigsby, 43 S.W. 271 (Tex. Civ. App. 1897)	12
United States v. State of Alabama, 252 F.Supp. 95-104 (1966)	22
United States v. Texas, 252 F.Supp. 234 (W.D. Tex.), affirmed 384 U.S. 155 (1966)	20
Wesberry v. Sanders, 84 S.Ct. 535	20, 22
Williams v. Castleman, 247 S.W. 263 (Tex. S.Ct. 1922)	11, 12, 13
Younger v. Harris, 91 S.Ct. 746 (1971)	26
Zwickler v. Koota, 88 S.Ct. 391 (1967)	26

UNITED STATES CONSTITUTION

Fourteenth Amendment	19, 23, 28

UNITED STATES STATUTES

28 U.S.C.A. 1343, 2201 and 2281	4
42 U.S.C.A. 1983	4

TEXAS CONSTITUTION

Article 5, Section 18	5, 8, 9, 10
Article 5, Section 24	11, 14, 15
Article 16, Section 14	10, 14, 15

VERNON'S ANNOTATED TEXAS ELECTION CODE

Article 1.05	28, 29, 30, 31

VERNON'S ANNOTATED TEXAS CIVIL STATUTES

Article 2351½	cited throughout brief

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BRIEF FOR THE APPELLEES

ORDER AND OPINION BELOW

A copy of the judgment order issued January 30, 1974, by the three judge United States District Court for the Southern District of Texas, Houston Division, is appended hereto and marked Exhibit A. A copy of the written opin-

ion of the court, filed February 8, 1974, is appended hereto and marked Exhibit B. Both the judgment order and opinion of the District Court are as yet unreported.

JURISDICTION

The judgment of the District Court was entered January 30, 1974. On February 4, 1974, upon motion duly made by Appellants, Mr. Justice Powell entered his order staying the execution and enforcement of the District Court judgment pending further order of the Supreme Court.

On February 19, 1974, the Supreme Court denied the Appellees' motion to vacate Mr. Justice Powell's stay order.

Appellants' jurisdictional statement was filed April 3, 1974, and thereafter on May 10, 1974, the Appellees filed their motion to dismiss and on June 3, 1974, probable jurisdiction was noted by the Supreme Court.

This appeal is one from the judgment of a three judge United States District Court for the Southern District of Texas, Houston Division, entering a declaratory judgment and granting a permanent injunction restraining the enforcement, operation and execution of a State statute.

STATUTE INVOLVED

Article 2351½, Vernon's Annotated Texas Civil Statutes (Acts 1965, 59th Tex. Leg., p. 1523, ch. 664, sec. 1. eff. August 30, 1965), provided as of the dates involved in this case, and presently so provides:

Art. 2351½. Change in boundaries of commissioners precincts and justice of the peace precincts

(a) Whenever the Commissioners Court changes the boundaries of commissioners precincts or of justice precincts, it may specify in its order a future date, not later than the first day of January following the next general election, on which the changes shall become effective. If an election for any precinct office is held before the effective date of the order, the office shall be filled at the election by the voters of the precinct as it will exist on the effective date of the change in boundaries. A person who has resided within the territory embraced in the new boundaries for the length of time required to be eligible to hold the office shall not be rendered ineligible by virtue of the precinct's not having been in existence for that length of time.

(b) When boundaries of commissioners precincts are changed, the terms of office of the commissioner then in office shall not be affected by such change, and each commissioner shall be entitled to serve for the remainder of the term to which he was elected even though the change in boundaries may have placed his residence outside of the precinct for which he was elected.

(c) When boundaries of justice of the peace precincts are changed, so that existing precincts are altered, new precincts are formed, or former precincts are abolished, if only one previously elected or appointed justice of the peace or constable resides within a precinct as so changed, he shall continue in office as justice or constable of that precinct for the remainder of the term to which he was elected or appointed. If more than one justice or constable resides within a precinct as so changed, or if none resides therein, the office shall become vacant and

the vacancy shall be filled as other vacancies; provided, however, that in precincts having two justices, if two reside therein, both shall continue in office, and if more than two reside therein, both offices shall become vacant.

Added by Acts 1965, 59th Leg., p. 1523, ch. 664, § 1, eff. Aug. 30, 1965.

QUESTION PRESENTED

Whether Article 2351½ (c), Vernon's Annotated Texas Civil Statutes, either facially or as applied in this instance, violates the due process clause and the equal protection guarantees of the Fourteenth Amendment to the Constitution of the United States?

STATEMENT

This suit was brought by Appellees, under 28 U.S. C.A. 1343, 2201 and 2281; and 42 U.S.C.A. 1983 and 1985 (3), seeking to have declared unconstitutional a Texas Statute, viz., Article 2351½(c), and to have set aside an order of Appellants, the Harris County Commissioners Court, redistricting the eight justice of the peace and constable precincts, pursuant to the authority granted by Article 2351½(c), which order, by reason of the effect of the statute, vacated the offices of five Appellees, all of whom had been previously elected, three of whom were justices of the peace and two of whom were constables. The terms of office of the three Appellee justices of the peace expire at midnight on the 31st day of December, 1974. The terms of office of the two Appellee constables expire at midnight on the 31st day of December, 1976.

Appellee, John Boynton, a citizen resident of old justice of the peace Precinct No. 7, joined in the suit as a representative of the class of citizens whose constitutional rights had allegedly been violated by the order of the Appellants on June 28, 1973.

The Appellants, the Harris County Commissioners Court, collectively comprise the general governing body of Harris County, Texas. The duties of a commissioners court under Texas law were reviewed at length in *Avery v. Midland County, Texas,* 88 S.Ct. 1114. One of their duties is to redistrict the justice of the peace and constable precincts "from time to time, for the convenience of the people". This authority is set out in *Article 5, Section 18, of the Texas Constitution.* (See Exhibit C).

On January 12, 1973, the Appellants appointed a nine member committee to study and recommend to them new boundaries for the eight justice of the peace and constable precincts of the County. After several public meetings, various plans were considered and submitted to Appellants for consideration. On June 28, 1973, Appellants disregarded all plans submitted by the redistricting committee and adopted a plan submitted by Mr. Tom Bass, one of the Appellants herein. The "Bass" plan, as it became known, was adopted by Appellants and placed into effect three days after its adoption.

The stated purposes for redistricting the justice of the peace and constable precincts were to eliminate the gross population disparities existing between such precincts; to make the offices more convenient to all of the people of the county; and to draw new precinct boundaries along ethnic or racial lines so as to assure the election of minorities to the offices of justice of the peace and constable in the future. The main consideration as contended by Appellants for redistricting was that the gross

population disparity of the various precincts created a compelling state interest to bring about redistricting of the said justice of the peace and constable precincts.

On June 28, 1973, the day that the order of redistricting was passed by Appellants, one of the Appellees herein, Richard E. Moore, filed suit to enjoin such action in a state district court, alleging therein that the authority of Article 2351½ (c) offended the laws and the Constitutions of the State of Texas and of the United States. The state court on a hearing of said petition for a temporary injunction denied said application on June 29, 1973. Thereafter, on the same date, Petitioner therein and Appellee herein, Richard E. Moore, in agreement with Appellants, took a non-suit in said State District Court action. (Stipulations of evidence, p. 5, item 20).

Following redistricting, four justices of the peace and three constables of former precincts resided in new Precinct 4, all offices of the four justices of the peace and the three constables were declared vacant pursuant to the provisions of Article 2351½ (c). Afterwards, Appellants filled the vacancies in new Precinct 4 with one former justice of the peace and the other justice of the peace vacancy was filled by appointing a person of Appellants' choice who had never been elected to the office of justice of the peace. The constable vacancy in new Precinct 4 was filled by the appointment of one of the three former constables.

Inasmuch as all parties to the cause of action pending before the three judge District Court had filed and agreed to stipulations of evidence concerning said suit, the matter was heard on oral arguments only on January 30, 1974, and the Court issued its judgment order on that day, declaring as follows:

"1. The Court has jurisdiction under Title 28, U.S.C.A. Section 2281.

2. The Texas statute Article 2351½, Vernon's Annotated Texas Civil Statutes, is facially unconstitutional.

3. The order of the Commisisoners Court of Harris County, Texas, of June 28, 1973, complained of herein issued pursuant thereto is therefore permanently enjoined." (See Exhibit A.)

In its opinion issued February 8, 1974, the Court made the following findings:

> "Insofar as Article 2351½ operates to truncate the term of a duly elected justice of the peace or constable upon the circumstance that a convenience redistricting places him in a precinct with other such officers, it invidiously and irrationally discriminates between him and other such officers in other precincts not so affected."

and,

> "That the effect of such statute in cutting short the terms of such officers constitutes an impermissible abridgment of the franchise of those voters who had voted for them or who had been entitled to vote for them."

In addition, *the Court, after hearing all the evidence, stipulations and arguments of counsel, found that no compelling state interest is served to justify such effects of the statute.*

SUMMARY OF ARGUMENT

The present Constitution of Texas became effective on the 1st day of January, 1876. Article 5, Section 18 of

that document (see Exhibit C) provides for as few as four and as many as eight justice of the peace precincts within each of the 254 counties of the state.

Article 5, Section 18 of the Texas Constitution, (see Exhibit C), and the interpretations of that provision by the Supreme Court of Texas in the cases of *Ex rel. Dowlen v. Rigsby, supra,* and *Williams v. Castleman, supra,* which established the law in 1897 that under the provisions of the foregoing Article 5, Section 18 of the Texas Constitution, (see Exhibit C), when an order for redistricting the justice of the peace and constable precincts goes into effect, the old precincts and precinct offices cease to exist and the new precincts and precinct offices come into existence with the offices vacant.

To make less severe some of the effects of the *State ex rel Dowlen v. Rigsby* case, *supra,* and the *Williams v. Castleman* case, *supra,* the Legislature of Texas adopted Article 2351½(c), (see Exhibit F.) Since its passage in 1965 up to the present time, it has been the law of Texas and was the law under which Appellees were removed from office on June 28, 1973, by Appellants.

The statute in question herein when applied, treats members of the same legislative class differently; it authorizes the removal of an elected official from office, without cause, prior to the expiration of their terms of office with the effect that it arbitrarily, invidiously, and irrationally discriminates against the elected official who is removed from office without cause and the voters who voted for him or were entitled to vote for him.

The application of Article 2351½ (c) to the facts herein, in an attempt to effect a mere voluntary convenience redistricting, could have been accomplished by Appellants

without the drastic effect of removing Appellees from office; the action could have been sustained in the Texas Courts if Appellants had entered its order pursuant to the authority of Article 16, Section 14 of the Texas Constitution, (see Exhibit E), and the interpretation of this provision by the Court of Civil Appeals of Texas in *Ehlinger v. Rankin,* 29 S.W. 241, (1895).

No compelling state interest exists herein which would justify the legislative abridgment of the fundamental rights of Appellees as guaranteed by the Fourteenth Amendment to the Federal Constitution inasmuch as the redistricting done herein was voluntary and not mandatory.

Article 2351½ (c), (see Exhibit F), is not fairly subject to an interpretation by a State Court which will avoid or modify the federal questions involved and, therefore, the District Court below properly refused to apply the Doctrine of Abstention and entered its order and findings that Article 2351½ (c), (see Exhibit F), arbitrarily, irrationally and invidiously discriminated against the Appellees when said statute was applied.

I.

HISTORY OF THE TEXAS LAW REGARDING JUSTICES OF THE PEACE AND CONSTABLES

The present Constitution of Texas was adopted in 1875 and became effective January 1, 1876. This instrument was in effect at the time this controversy arose and it remains in effect to the present.

The elective offices of justice of the peace and constable are creatures of the State Constitution. Article 5,

Section 18 of the Texas Constitution, (see Exhibit C) authorizes the creation of the offices and as few as four and as many as eight such precincts are permitted for each of the 254 counties of Texas.

Once the offices were created by the various commissioners courts, Article 5, Section 28 of the Texas Constitution provides for the filling of the vacancies that exist at creation. This provision is as follows:

Article 5, Section 28, Texas Constitution.

Section 28. Vacancies in judicial offices

> Sec. 28. Vacancies in the office of Judges of the Supreme Court, the Court of Criminal Appeals, the Court of Civil Appeals and District Court shall be filled by the Governor until the next succeeding general election; and vacancies in the office of County Judge and justices of the peace shall be filled by the Commissioners Court until the next general election for such offices. As amended Aug. 11, 1891, proclamation Sept. 22, 1891.

When making a determination of the residential requirements of the holders of the office of justice of the peace and constable, both county offices, Article 16, Section 14 of the Constitution provides as follows:

Article 16, Section 14, Texas Constitution.

Section 14. Civil officers; residence; location of offices

> Sec. 16. All civil officers shall reside within the State; and all district or county officers within their districts or counties, and shall keep their offices at such places as may be required by law; and failure to comply with this condition shall vacate the office so held.

Being practical, the framers of the Constitution realized that at some future time, a holder of the office of justice of the peace or constable might need to be removed from office prior to the expiration of his term of office and they inserted the provisions for removal from office in Article 5, Section 24 of the Texas Constitution, which provides as follows:

Article 5, Section 24, Texas Constitution.

Section 24. Removal of County Officers

> Sec. 24. County judges, county attorneys, clerks of the district and county courts, justices of the peace, constables and other county officers, may be removed by Judges of the District Court for incompetency, official misconduct, habitual drunkeness, or other causes defined by law, upon the cause therefor being set forth in writing and the finding of its truth by a jury.

Thus, the four provisions in the Constitution as outlined in the preceding paragraphs provide for the creation of the office; filling vacancies that exist in the office; determination of the residential requirements during tenure of the office; and, how to remove a holder of the office prior to the expiration of his office.

Prior to the adoption of Article 2351½(c), the courts of Texas had long followed the rule that upon the effective date of a redistricting order, the old precincts and precinct offices ceased to exist, and as of that date, new precincts came into existence with the precinct offices vacant. ***State ex rel Dowlen v. Rigsby,*** 43 S.W. 1101 (Tex. S.Ct. 1897); ***Williams v. Castleman,*** 247 S.W. 263 (Tex. S.Ct. 1922).

In *State v. Rigsby*, 43 S.W. 271 (Tex. Civ. App. 1897), decided twenty-one (21) years after the adoption of the present Texas Constitution, of which the Texas Supreme Court in a memorandum decision at 43 S.W. 1101 (1897), adopted the decision of the Court of Civil Appeals as the law of the State in the matter described therein. In the *Rigsby* case, *supra*, Rigsby, a justice of the peace, sought reinstatement to office after being ousted from office because of realignment of the boundaries by the commissioners court. The Court in denying relief to the ousted elected official Rigsby, declared:

> ". . . the power to establish the precincts does not necessarily conflict with the provision fixing the terms of office. They must stand together. The office is taken subject to the power to change the boundaries of the precincts. While the office is property, it is held subject to the proper exercise of all such powers as these. There is no contract between the state and its officers which forbids such action. Mechem, Pub. Off. Sec. 855."

In the subsequent case of *Williams v. Castleman, supra*, the Texas Supreme Court reviewed at length the history of Article 5, Section 18, tracing it back to the Constitution of the Republic of Texas, and declared:

> ". . . The Constitution has prescribed that the power of determining the number of justice precincts, and of dividing the county into them, shall be exercised 'from time to time', which means it has a potential existence at all times, and the division, redivision, or redetermination may be made at any time.
>
> "It is thus seen that there is no limitation on the time when the commissioners' court may divide a

> county into justice precincts, and that, aside from the maximum and minimum prescribed in the Constitution does not state how the power of division by the commissioners' court shall be exercised. It is certain that, in the absence of reasonable legislative action, the commissioners' court may perform the duty enjoined upon them in their own way, so long as that performance does not amount to a gross abuse of power, is not fraudulently exercised, or is not so grossly arbitrary as that, under principles unnecessary to discuss, it might be void and amount to no action."

The holdings of *State ex rel Dowlen v. Rigsby, supra*, and *Williams v. Castleman, supra*, have been unanimously adhered to by the Texas courts in the following cases: *Hastings v. Townsend*, 136 S.W. 1143 (Tex. Civ. App. 1911, no writ history); *Brown v. Meeks*, 96 S.W.2d 839 (Tex. Civ. App. 1936, error dismissed); *Meredith v. Sharp*, 256 S.W.2d 870 (Tex. Civ. App. 1953, error refused, n.r.e.).

In 1965, the Texas Legislature sought to minimize the more harsh effects of *State ex rel Dowlen v. Rigsby, supra*, and *Williams v. Castleman, supra*, and adopted the State Statute in question, Article 2351½(c).

Pursuant to the provisions of Article 2351½(c), the Appellants entered their order redistricting all justice of the peace and constable precincts in Harris County, Texas, on June 28, 1973. The effect of Appellants' order declared a vacancy in the offices of five of the Appellees and automatically removed them from offices to which they had been elected, without cause, prior to the expiration of their terms of office.

II.

FEDERAL CONSTITUTIONAL GUARANTEES ARE OFFENDED WHEN THE STATE STATUTE IN QUESTION IS APPLIED

A. The due process clause and the equal protection guarantee of the Fourteenth Amendment of the Federal Constitution are offended when the office of an elected official is automatically declared vacant upon a mere convenience redistricting which removes an elected official from office, without cause, prior to the expiration of the term of office, when

(1) The law is applied differently to members of the same class.

Article 5, Section 24, of the Texas Constitution provides as follows:

> Section 24. Removal of County Officers.
>
> Section 24. County judges, county attorneys, clerks of the district and county courts, justices of the peace, constables and other county officers, may be removed by Judges of the District Court for incompetency, official misconduct, habitual drunkeness, or other causes defined by law, upon the cause therefor being set forth in writing and the finding of its truth by a jury.

Article 16, Section 14, of the Texas Constitution contains the following provisions:

> Section 14. Civil Officers; Residence; Location of Offices.
>
> Section 14. All civil officers shall reside within the state; and all district or county officers within their districts or counties, and shall keep their offices at such places as may be required by law; and failure to comply with this condition shall vacate the office so held.

By viewing Article 5, Section 24, of the Texas Constitution, it is readily seen that the Constitution has classified various elected officials as county officers, including justice of the peace and constables.

Article 16, Section 14, of the Texas Constitution further enumerates such classification of elective officials in Texas as either civil officers with statewide jurisdiction, district officers with district jurisdiction comprised of one or more counties and county officers, whose jurisdiction extends only within the boundaries of the county.

The authorities approving legislative or constitutional classification are so universally established that no citations are given herein. However, the criterion established for class legislation is fairly stated in *State v. Erickson*, 225 Iowa 1261, 282 N.W. 728. The test as to meeting the requirements of due process being whether the law operates equally upon all who come within the class so affected, embracing all persons who are or may be in like situations or circumstances and; the Constitution is offended where a public law is applied differently to different persons under the same or similar circumstances. *Mayor of Savannah v. Savannah Distributing Co., Inc.*, 43 S.E.2d 704.

To fulfill the requirements of due process, the law must be applied so that it operates equally upon all who come within the class so affected. By viewing Article 2351½(c), it is obvious that this statute fails to meet

the test of due process when applied to legislative classification.

This case is a simplified example of Article 2351½(c) failing to meet the requirements of due process, to-wit:

The Appellees justices of the peace and constables were removed from office by the application of Article 2351½(c), *simply because of where they resided after redistricting;* while the justices of the peace and constables in old and new Precincts 1, 2, 3 and 8 remained in office *simply because of where they resided after redistricting,* a variance of 180 degrees.

In addition to Article 2351½(c), failing to meet the test for due process for the reasons set out in the preceding paragraphs, the test of due process is not met when comparing Article 2351½(c), with Article 2351½(b), (see Exhibit F). The latter guarantees the continuation in office of a county commissioner, who is also a county officer, when the commissioner precincts are redistricted even though he no longer resides in the precinct from which he was elected. While Article 2351½(c) provides for the removal of justices of the peace and constables, who are classed as county officers, when redistricting occurs and he no longer lives in the precinct from which he was elected. Thus, again, the law fails to be applied evenly to members of the same class.

Article 2351½(c), therefore, invidiously and irrationally discriminates against one elected official upon the circumstance that a mere convenience redistricting places him in a district with others thereby removing him from office, while others, of the same class are not so affected, and the due process clause of the Fourteenth Amendment is violated thereby.

(2) Malapportioned precincts after redistricting.

The right to have one's vote count as equal to that of another is a basic constitutional principle. *Gray v. Sanders,* 83 S.Ct. 801, *Massachusetts v. Burkhart,* 207 F. Supp. 885, 893.

In *Avery v. Midland County, Texas, supra,* the Court applied the principles that apply in this instance, to-wit:

A. That a state's political subdivision must comply with the Fourteenth Amendment.

B. The Fourteenth Amendment forbids election of local governmental officials from districts of disparate population.

C. The Equal Protection Clause reaches exercise of state power however manifested, whether exercised directly or through subdivision of the state.

D. City, town or county may no more deny equal protection of the law than it may abridge freedom of speech, establish official religion, arrest without probable cause, or deny due process of law.

E. When state delegates law making power to local government and provides for election of local officials from districts specified by statute, ordinance, or local charter, it must insure that those qualified to vote have right to equally effective voice in election process.

PRECINCT POPULATION EXHIBIT

The population count of the eight justice precincts, before and after the redistricting of June 28, 1973; the population difference between the smallest precinct and the remainder of the precincts after redistricting; a percentage comparison between the smallest precinct in

population and the remainder of the precincts after re-districting, are as follows:

Pct. No.	Population Before	Population After	Population Difference After	Population Percentage Comparison After	Area In Square Miles After	Area Percentage Comparison After
1.	999,424	343,765	197,865	135.5%	66.0	3.8%
2.	436,974	145,960	Base Number	Base Number	88.0	5.0%
3.	111,106	169,959	23,999	16.0%	338.0	19.4%
4.	81,879	175,769	29,809	20.4%	593.0	33.9%
5.	6,966	337,844	191,884	131.4%	399.0	22.8%
6.	8,848	179,971	34,011	23.3%	32.0	1.8%
7.	11,976	238,401	92,411	63.3%	83.0	4.7%
8.	84,739	149,863	3,903	2.6%	150.0	8.6%

* The total population of Harris County, Texas per the 1970 Bureau of the Census Report is 1,741,912 persons.

* The total number of square miles in Harris County, Texas is 1750.

A careful review of the preceding exhibit reveals that the requirements of the *Avery* case, *supra,* have not been met. It is clearly shown therein that after redistricting the precincts on June 28, 1973, new Precincts Nos. 1 and 5 had more than twice the number of residents of new Precincts Nos. 2 and 8. A vote cast by a citizen-voter in Precinct Nos. 2 or 8 for a justice of the peace or constable would count two and one-thirds (2-1/3) times more than a vote cast by a citizen-voter in new Precincts Nos. 1 and 5 for the same offices.

Applying the test of "convenience of the people" to the redistricting of June 28, 1973, it certainly would not be

as convenient for a resident of new Precinct No. 4 which contains in excess of 593 square miles, or approximately one-third (1/3) of the total county area, inside its boundaries, as it would be for residents of new Precinct No. 6, which contains only 32 square miles within its boundaries.

While the Court was concerned with the mandatory redistricting of units of local government with general governmental powers in the *Avery* case, *supra,* their holding therein equally applies to units of local government with non-general governmental powers when a redistricting is undertaken voluntarily pursuant to a state statute. While the Court would not compel such a unit of government to redistrict mandatorily pursuant to the requirements of *Avery, supra,* the Court should compel the application of the requirements of the *Avery* case, *supra,* when such units are redistricted voluntarily pursuant to a state statute; to do otherwise would permit an impermissible abridgement of the equal protection clause of the Fourteenth Amendment to the Federal Constitution.

The failure to apply the one man - one vote principle in this case with resulting malapportioned precincts for justices of the peace and constables, who are paid from the general treasury of the county and whose jurisdiction is county wide, *arbitrarily, invidiously* and *irrationally* discriminates between a citizen-voter of one justice of the peace and constable precinct and a citizen-voter of another justice of the peace and constable precinct whose vote is 2 and 1/3 times greater.

B. The rights of the electorate, as guaranteed by the due process clause of the Fourteenth Amendment to the Federal Constitution, are offended when an elected official for whom they voted or for whom they are entitled to vote is removed from office, without cause, prior to the expiration of his term of office for which he was elected.

In *United States v. Texas*, 252 F. Supp. 234 (W.D. Tex.) affirmed by the Supreme Court at 384 U.S. 155 (1966) the Court said:

> "It cannot be doubted that right to vote is one of the fundamental personal rights included within the concept of liberty as protected by the due process clause."

The reapportionment cases, *Reynolds v. Sims*, 84 S.Ct. 1362; *Davis v. Mann*, 84 S.Ct. 1441; *Roman v. Sincock*, 84 S.Ct. 1449; and others, and the decision in *Carrington v. Rash*, 85 S.Ct. 775 (1965), require a recognition that today voting is the most important means of participating in our democratic society. Recognition of this is implicit in the declaration of the Supreme Court in *Reynolds v. Sims, supra*, that:

> "the right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government."

There is similar language in *Wesberry v. Sanders*, 84 S.Ct. 535:

> "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which * * * we must live. Other rights, even the most basic, are illusory if the right to vote is undermined."

Even though not specifically mentioned in the Constitution, the right to vote clearly constitutes one of the most basic elements of our freedom—the "core of our constitutional system." *Carrington v. Rash*, 1965, *supra*:

> "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live."

As stated by the Supreme Court, *fundamental personal liberties may not be abridged by the States* simply on a showing that a regulatory statute had some rational relationship to the effectuation of a proper state purpose:

> "Where there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling," *Bates v. City of Little Rock*, 80 S.Ct. 412.
>
> The law must be shown,
>
> "necessary, and not merely rationally related, to the accomplishment of a permissible state policy." *McLaughlin v. State of Florida*, 85 S.Ct. 283. See *Schneider v. State of New Jersey, Town of Irvington*, 60 S.Ct. 146.

To determine whether a right is protected by the due process clause, a court must look to the,

> "traditions and (collective) conscience of our people" to determine whether a principle is "so rooted (there) * * * as to be ranked as fundamental." *Snyder v. Com. of Massachusetts*, 54 S.Ct. 330.

The inquiry is whether a right involved,

> "is of such a character that it cannot be denied without violating those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions' * * *." *Powell v. State of Alabama,* 53 S.Ct. 55.

When measured against these standards and examined in the light of Supreme Court pronouncements describing it as our most "precious" right, *Wesberry v. Sanders,* 1964, 84 S.Ct. 526, and as the "essence of a democratic society," *Reynolds v. Sims,* 1964, *supra,* it cannot be doubted that the right to vote is one of the fundamental personal rights included within the concept of liberty as protected by the due process clause.

The term abridged as is used in *Bates v. City of Little Rock,* 80 S.Ct. 412, is further defined in *United States v. State of Alabama,* 252 F. Supp. 95-104 (1966) wherein the Court said:

> "The term abridged is defined as: 'To make shorter; to shorten in duration; diminish; curtail; as, to abridge a visit—as to abridge one of his rights."

In weighing the justification that a state presents for legislative or judicial abridgement of a citizens rights, the Court must be sure that the States' attempt to achieve a legitimate end does not use means "which sweep unnecessarily broadly and thereby invade the area of protected freedoms." *N.A.A.C.P. v. Alabama ex rel. Flowers,* 1964, 84 S.Ct. 1302. "In an area touching our most precious freedoms," precision of regulation must be the touchstone * * *," *N.A.A.C.P. v. Button,* 1963, 83 S.Ct. 328; and, "the breadth of legislative abridgement must be viewed in the light of less drastic means for achieving

the same basic purpose." *Shelton v. Tucker,* 1960, 81 S.Ct. 247, 252.

If a citizen of a state is given the right to vote, a fundamental right, and that right is guaranteed by the due process clause of the Fourteenth Amendment to the Federal Constitution, then it stands to reason that a state law which permits the state to abridge that right is offensive to due process; put another way, any state law which permits a state to remove an elected official from an office to which he was elected, without cause, prior to the expiration of his term of office, constitutes an *impermissible abridgement of the fundamental right to vote* of those citizen-voters who voted for him or were entitled to vote for him. Otherwise, what good is it to give the right to vote, a most precious right, if it is permitted to be abridged by a state statute, at the whim of a county commissioners court, as was done herein.

A less drastic means is available to Appellants that they could have used herein and have achieved the desired results of redistricting without removing an elected official from office prior to the expiration of his term of office. Article 16, Section 14 of the Texas Constitution, (see Exhibit E), and the provisions of *Ehlinger v. Rankin,* 1895, 29 S.W. 241, Ct. Civ. App. of Tex., which literally establishes the law that justices of the peace and constables are county officers and the only limitation upon them, in reference to residency requirements, during their terms of office is that they must reside within the county in which they were elected. Had the law as established in Article 16, Section 14 of the Texas Constitution, (see Exhibit E), and in *Ehlinger v. Rankin, supra,* been applied as it rightly should have been to the facts that exist herein, no confrontation with the rights as guaranteed

by the Federal Constitution would have been necessary inasmuch as all rights as guaranteed by the Fourteenth Amendment would have been protected; *thereby applying a less drastic means of achieving the same purpose* as decreed in *Shelton v. Tucker, supra.*

III.

THE DISTRICT COURT ACTED CORRECTLY IN REFUSING TO APPLY THE ABSTENTION DOCTRINE BELOW

A. The state statute in question is not fairly subject to an interpretation which will avoid or modify the Federal Constitutional questions involved.

The Appellants in their brief at page 31, would urge the Court to apply the Doctrine of Abstention herein to afford a Texas Court the opportunity to issue a definitive decision on the question whether justices of the peace and constables are county officers. They assure the Court that such a determination would render unnecessary a federal constitutional decision under the Fourteenth Amendment. No such question is now pending before the Courts of Texas.

In this regard, Appellees would respond that such contention as is made by Appellants is designed more to mislead the Court than to urge a serious consideration by the Court of their contention.

The appropriate portion of Article 2351½(c), the State Statute in question, provides as follows:

> Article 2351½(c), Vernon's Annotated Texas Civil Statutes.

> Sec. (c). When boundaries of justice of the peace precincts are changed, so that existing precincts are altered, new precincts are formed, or former precincts are abolished, if only one previously elected or appointed justice of the peace or constable resides within a precinct as so changed, he shall continue in office as justice or constable of that precinct for the remainder of the term to which he was elected or appointed. If more than one justice or constable resides within a precinct as so changed, or if none resides therein, the office shall become vacant and the vacancy shall be filled as other vacancies; provided, however, that in precincts having two justices, if two reside therein, both shall continue in office, and if more than two reside therein, both offices shall become vacant.

Would a definitive decision, by a Texas Court, declaring justices of the peace and constables county officers who could legally reside outside the boundaries of the precincts from which they were elected, alter the effects of the provisions of Article 2351½(c) when applied? No, because if more than one elected justice of the peace or constable resided in a precinct as so changed, their elective offices would still be declared vacant and the same situation as exists herein would still prevail, even though they would have been declared county officers.

The *Abstention Doctrine*, which is judge made, first appeared in 1941 in *Railroad Commission of Texas v. Pullman Company*, 61 S.Ct. 643, and the Court held that:

> "This case sanctions such escape (from hearing and deciding the case when presented, by application of the Abstention Doctrine) only in narrowly limited 'special circumstances'."

In *Zwickler v. Koota*, 88 S.Ct. 391 (1967), the Court said that:

> "The availability of declaratory relief in state courts on federal claims is not reason for abstention."

In the absence of a pending state proceeding, the exercise of federal court jurisdiction ordinarily is appropriate if the conditions for declaratory relief are met. *Younger v. Harris*, 91 S.Ct. 746 (1971). The required conditions called for in *Younger v. Harris* were set forth in *Maryland Casualty Company v. Pacific Coal & Oil Co.*, 61 S.Ct. 510 (1941) and the test established therein is as follows:

> "Whether there is a substantial controversy between parties having adverse legal interests of sufficient immediacy and reality to warrant the issuance of declaratory relief."

The best test as when to apply and when not to apply the *Abstention Doctrine* was set forth in *N.A.A.C.P. v. Bennett*, 79 S.Ct. 1192, wherein the Court held:

> "Though never interpreted by a state court, if a state statute is not fairly subject to an interpretation which will avoid or modify the federal constitutional question, it is the duty of a federal court to decide the federal question when presented to it. Any other course would impose expense and long delay upon the litigants without hope of it bearing fruit."

Applying the law as set forth in *Railroad Commission of Texas v. Pullman, supra; Zwickler v. Koota, supra; Younger v. Harris, supra; Maryland Casualty Company v. Pacific Coal & Oil, supra,* and the test for determining

when the Abstention Doctrine should be applied as enumerated in *N.A.A.C.P. v. Bennett, supra,* to the facts of the instant case, it is extremely clear that Article 2351½(c) is not fairly subject to an interpretation which will avoid or modify the federal constitutionl questions involved and the *Abstention Doctrine* is not applicable herein.

B. No compelling state interests shown that would justify the state's acts of offending the due process clause and the equal protection guarantee of the Fourteenth Amendment to the Federal Constitution as was done herein.

If we are to accept Appellants' position on appeal, then we must conclude that a redistricting of justice of the peace and constable precincts, which were extremely disproportionate *prior* to redistricting and which were extremely disproportionate *after* redistricting, is a compelling state interest. (See Exhibit D).

Appellees would stipulate that redistricting was needed prior to June 28, 1973. Likewise, Appellees would stipulate that redistricting was needed after that date. By viewing Exhibit D, it is seen that after redistricting occurred, a variance of 135% existed in population comparison between the largest and the smallest precincts. Why then, would Appellants argue that this redistricting served a compelling state interest? Since this was a voluntary redistricting, why did not Appellants follow the general standards that are fairly applied in mandatory redistricting; that is, why did not Appellants apply the one-man, one-vote principle? Could Appellants' intent have been to serve their personal interest rather than serving some alleged compelling state interest?

While recent decisions of the Supreme Court, from *Baker v. Carr,* 82 S.Ct. 691 (1962), which established the one-man, one-vote principle for establishing legislative bodies to *Avery v. Midland County, Texas,* 88 S.Ct. 1114 (1968), which applied the one-man, one-vote principle to units of local governments with general governmental powers, have mandatorily required redistricting of bodies of government with general governmental powers, no such mandatory requirement has been applied in other units of local government.

But, what about instances, such as the one herein, where a unit of local government with non-general governmental powers is redistricted voluntarily? Does the failure to apply the one-man, one-vote principle offend the equal protection provision of the Fourteenth Amendment? In *Avery v. Midland County, supra,* the Court said that a state's political subdivisions must comply with the requirements of the Fourteenth Amendment.

The real compelling state interest in regard to redistricting is served when the vote of one taxpayer and citizen in a justice of the peace and constable precinct is of substantially equal weight to the vote of another taxpayer and citizen in a different precinct within the same county.

The order of Appellants of June 28, 1973, in creating justice of the peace and constable precincts which are extremely disproportionate in population, *no compelling state interest was served thereby* which would justify offending the *"Due Process Clause"* of the Fourteenth Amendment to the Federal Constitution.

Secondly, Appellants would urge that Texas precinct residency requirements such as is now embodied in Article 1.05, Vernon's Annotated Texas Election Code, is a compelling state interest. The provisions of that Article are as follows:

Article 1.05, Texas Election Code.

Art. 1.05. Ineligibility

No person shall be eligible to be a candidate for, or to be elected or appointed to, any public office in this state unless he is a citizen of the United States eligible to hold such office under the Constitution and laws of this state and is under none of the disabilities for voting which are stated in Article VI, Section 1 of the Constitution of Texas on the date of his appointment or of the election at which he is elected, and unless he will have resided in this state for a period of twelve months next preceding the applicable date specified below, and for any public office which is less than statewide, shall have resided for six months next preceding such date in the district, county, precinct, municipality or other political subdivision for which the office is to be filled:

(1) For a candidate whose name is printed on the ballot for a general (first) primary election, the applicable date is the last day on which any candidate for the office involved could file his application to have his name printed on the ballot for that primary election.

(2) For an independent or nonpartisan candidate in a general or special election, the applicable date is the last day on which the candidate's application for a place on the ballot could be delivered to the appropriate officer for receiving the application.

(3) For a write-in candidate, the applicable date is the day of the election at which the candidate's name is written in.

(4) For a party nominee who is nominated by any method other than by primary election, the ap-

plicable date is the day on which the nomination is made.

(5) For an appointee to an office, the applicable date is the day on which the appointment is made.

The foreging requirements shall not apply to any office for which the Constitution or statutes of the United States or of this state prescribe qualifications in conflict herewith, and in case of conflict the provisions of such other laws shall control.

Except as provided in Section 104 of this code,[1] no eligible candidate shall ever have his name placed upon the ballot at any primary, general or special election. No ineligible candidate shall ever be voted upon nor have votes counted for him at any such primary, general or special election for the purpose of nominating or electing him, but votes cast for an ineligible candidate shall be taken into account in determining whether any other candidate received the necessary vote for nomination or election. No person who advocates the overthrow by force or violence or change by unconstitutional means of the present constitutional form of government of the United States or of this state, shall be eligible to have his name printed on any official ballot in any general, special or primary election in this state.

Amended by Acts 1967, 60th Leg., p. 1861, ch. 723 § 4, eff. Aug. 23, 1967.

Appellants urge the Court that Article 1.05, *supra* acting in conjunction with Article 2351½(c), establishes a residency requirement within a justice of the peace or constable precinct which is of such a compelling state interest to justify the effects of Article 2351½(c).

1. Article 8.22.

Article 16, Section 14 of the Texas Constitution, (see Exhibit E), establishes the residency requirements of county officers in Texas. And justices of the peace and constables having been classified as county officers in Article 5, Section 24, Texas Constitution, (see Exhibit G), and the decision of the Court in *Ehlinger v. Rankin*, 29 S.W. 241, Ct. Civ. App. of Tex. (1895) which interpreted Article 16, Section 14, Texas Constitution, governs the residency requirement of the offices in question and it provides as follows:

> " . . . that this provision is self-enacting and needed no legislation to be put into effect. The residency requirement of this constitutional provision requires that a county officer live in the county. The county referred to is the county in which he was elected."

Yet, in spite of *Article 16, Section 14*, of the *Texas Constitution*, and the decision in *Ehlinger v. Rankin, supra*, Appellants contend that a justice of the peace and constable must reside in the precinct in which they are serving during their term of office. Further, they contend that *Article 1.05* of the *Texas Election Code*, is the compelling state interest justifying the effects of the state statute in question herein.

The Three Judge District Court, which heard all the evidence of all parties, heard the arguments of all Counsel therefor, was in the best position to judge whether Appellants' actions justified the denial of the rights as guaranteed by the Fourteenth Amendment of the Federal Constitution.

The Court concluded, after all parties had been heard, as follows:

> " . . . insofar as Article 2351½(c) operated to end the term of a duly elected official upon the circumstance of a mere convenience redistricting, it invidiously and irrationally discriminates against the official and the electorate who voted for him or were entitled to vote for him and voters whose franchise was not so bobbed."

The Court further held:

> "The new precincts were clearly not drawn with equality in mind; nor would population equalization, if seen as a compelling reason for redistricting, bear any necessary relation to vacating these offices, a different consideration entirely."

While Appellants argue the great need for redistricting and the great need for compliance with *Article 1.05* as being compelling state interests, justifying the effects of Article 2351½(c) (see Exhibit F), they fail to note the compelling interests of the Fourteenth Amendment to the Federal Constitution which protects the citizen from a state that promotes laws which are invidious and discriminatory. Appellants' strong defense of these provisions and their strong urging to the Court that they justify the effects of Article 2351½(c), *Id.*, as a compelling state interest, is reminiscent of the story of the dead mackerel that lay upon the ocean shore, it silver coat glistening in the light of the moon; it shines and stinks at the same time.

IV.

NO ADEQUATE REMEDY EXISTS FOR APPELLEES UNDER TEXAS LAW

In *State ex rel. Dowlen v. Rigsby*, 43 S.W. 1101, (Tex. S.Ct. 1897) and the reiteration of the holding of the

Rigsby case, *supra*, in *Williams v. Castleman*, 247 S.W. 263 (Tex. S.Ct. 1922), which holds:

> " . . . that upon the effective date of a redistricting order, redistricting the precincts of a justice of the peace or constable, the old precincts and precinct offices cease to exist, and as of that date, new precincts came into existence with the precinct offices vacant,"

the rule was established by the highest Court of the State of Texas and was the law until Article 2351½(c) came into existence in 1965.

When Article 2351½(c), came into effect, the holdings in the *Rigsby* case, supra, and the *Castleman* case, supra, no longer applied.

If Appellees were required to resort to the Texas Courts for relief in this instance, they would be compelled to attack the provisions of Article 2351½(c), because this was the instrument used by Appellants in removing them from office.

But, even if successful in challenging Article 2351½(c), and it is declared unconstitutional, the Doctrine of Stare Decisis, which Texas follows, would reimplement the holdings of the *Rigsby* case, *supra*, and the *Castleman* case, *supra*, which is even more harsh in its application than Article 2351½(c). Thus, as is permitted under the provisions of Article 2351½(c), the Appellees would automatically be removed from office, without cause, prior to the expiration of their terms of office.

Because of the foregoing, the federal constitutional questions would still exist in either situation. It is, there-

fore, inevitable that the federal constitutional questions raised must be resolved by a Federal Court.

To require Appellees to return to the State Court, in light of the decisions of the *Rigsby* case, *supra,* and the *Castleman* case, *supra,* and the explicit provisions of Article 2351½(c), neither of which gives consideration to the federal constitutional rights of Appellees, would impose unnecessary expense and long delay upon litigants without hope of bearing fruit.

CONCLUSION

It is submitted that the ruling of the District Court below was in all things proper and for the reasons set out in this Brief of Appellees, the lower Court should in all things be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned counsel for the Appellees do hereby certify that on August 12, 1974, they did deposit in the United States Mail, by Registered Mail, Return Receipt Requested, addressed to each of the following Appellants' and Appellees' Attorneys at the address shown, three (3) true and correct copies of this instrument, entitled' "Brief for the Appellees".

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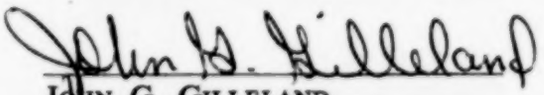
All parties required to be served have been served.

Signed:



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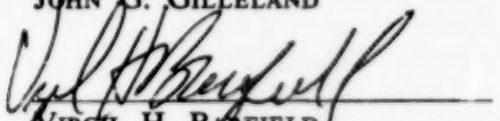

VIRGIL H. BARFIELD
Attorneys for Appellees

APPENDIX

This appendix contains the following listed exhibits:

Exhibit A — Judgment Order of the District Court

Exhibit B — Opinion of the District Court

Exhibit C — Article 5, Section 18, Vernon's Annotated Texas Constitution

Exhibit D — POPULATION EXHIBIT OF PRECINCT

Exhibit E — ARTICLE 16, SECTION 14, VERNON'S ANNOTATED TEXAS CONSTITUTION

Exhibit F — Article 2351½, Vernon's Annotated Texas Civil Statutes

Exhibit G — ARTICLE 5, SECTION 24, VERNON'S ANNOTATED TEXAS CONSTITUTION

Exhibit H — ARTICLE 5, SECTION 28, VERNON'S ANNOTATED TEXAS CONSTITUTION

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
Houston Division

CIVIL ACTION NO. 73-H-993

RICHARD E. MOORE, J. C. BOLTON, VERNON G. DOERING, J. W. MAHAN, GENE ZABOROSKI, and JOHN HOWE BOYNTON, on His Own Behalf and on Behalf of Every Resident Citizen of the Former Justice of the Peace Precincts Nos. 5, 6, and 7 of Harris County, Texas

v.

HARRIS COUNTY COMMISSIONERS COURT, WILLIAM ELLIOT, Individually and as County Judge of Harris County, E. A. LYONS, Individually and as a Member of the Harris County Commissioners Court, ROBERT ECKELS, Individually and as a Member of the Harris County Commissioners Court, JAMIE BRAY, Individually and as a Member of the Harris County Commissioners Court, and TOM BASS, Individually and as a Member of the Harris County Commissioners Court

ORDER

This action came on for hearing before a three-judge district court composed of the Honorable Thomas G. Gee, Circuit Judge, the Honorable John V. Singleton, Jr., District Judge, and the Honorable Carl O. Bue, Jr., District Judge, and the issues having been duly heard and decision having been duly rendered

It is ORDERED and ADJUDGED that

I. This court has jurisdiction under Title 28, U.S.C.A. § 2281.

II. The Texas statute Article 2351½, Vernon's Ann. Civ. St., is facially unconstitutional.

III. The order of the Commissioners Court of Harris County, Texas, of June 28, 1973, complained of herein issued pursuant thereto is therefore permanently enjoined.

An opinion of this court will follow.

DONE at Houston, Texas, on this the 30th day of January, 1973.

/s/ _____
Thomas G. Gee
Circuit Judge

/s/ _____
John V. Singleton, Jr.
District Judge

/s/ _____
Carl O. Bue, Jr.
District Judge

EXHIBIT B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS

Houston Division

NO. 73-H-993

RICHARD E. MOORE, ET AL

v.

HARRIS COUNTY COMMISSIONERS COURT, ET AL

NO. 73-H-1033

BLACKIE NEELEY

v.

HARRIS COUNTY COMMISSIONERS COURT, ET AL

Before GEE, Circuit Judge, SINGLETON and BUE, District Judges. GEE, Circuit Judge:

Plaintiffs are duly elected Justices of the Peace, Constables and voters of three former Harris County precincts which have been abolished by order of defendants, the County Judge and Commissioners of Harris County, Texas. At the time of the order, and today, the terms to which the plaintiff office-holders were elected had not expired. The Commissioners acted under authority of a Texas Constitutional provision[1] permitting revision of precincts from time to time "for the convenience of the people" and Article 2351½, Texas Revised Civil Statutes. This article provides, in pertinent part, as follows:

1. Tex. Const. Art. 5, §18.

(c) When boundaries of justice of the peace precincts are changed, so that existing precincts are altered, new precincts are formed, or former precincts are abolished, if only one previously elected or appointed justice of the peace or constable resides within a precinct as so changed, he shall continue in office as justice or constable of that precinct for the remainder of the term to which he was elected or appointed. If more than one justice or constable resides within a precinct as so changed, or if none resides therein, the office shall become vacant and the vacancy shall be filled as other vacancies; provided, however, that in precincts having two justices, if two reside therein, both shall continue in office, and if more than two reside therein, both offices shall become vacant.

The manner in which defendants' order redrew the Harris County precinct lines resulted in the vacating of Plaintiffs' offices by force of the quoted portion of the statute.

The statute is attacked on numerous grounds, most of which we need not discuss, since we conclude that its effect to end the term of some of the duly elected justices of the peace and constables of Harris County constitutes an impermissible abridgement of the franchise of those entitled to vote for them and a violation of the equal protection clause, both without the showing of any compelling state interest to be served thereby.

Defendants are local officers, functioning pursuant to statewide policies embodied in the constitutional and statutory provisions cited. An injunction is sought on constitutional grounds against the effect of Article 2351½ to truncate the term of some of the plaintiffs and set at nought the vote of those who elected them to these offices.

These offices are the creation of state law; the jurisdiction of the offices in question is statewide,[2] and the statute attacked is of statewide effect, and impact. The constitutional issues raised are not facially insubstantial, and the complaints clearly called for the convening of a three-judge court.

We are not unmindful of the decision in *Snowden v. Hughes*, 321 U.S. 1 (1944), in which the right of a citizen to be a candidate for state office was held to be unprotected by the privileges and immunities clause of the Fourteenth Amendment, or that in dicta the court extended its holding to the right to vote and hold such office. But we are persuaded that this case is not controlled by *Snowden*.

In the first place, on its facts *Snowden* involved a candidacy only. We treat here of a Texas state office, which has been repeatedly held by the courts of Texas to be a species of property, *e.g., State ex rel Jennett v. Owens*, 63 Tex. 261 (1885). The Fourteenth Amendment might well be seen as extending protection to an elected and qualified office-holder, but not to a mere aspirant as in *Snowden*.

In the second place, it appears that events have marched by the view taken in *Snowden* of the division of state and federal responsibilities.[3] More recent Supreme Court decisions have sapped the force of *Snowden's* vision of the federal structure. The "privileges and immunities"

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2. E.g. Arts. 2385, 6885, Tex. Rev. Civ. Stat. The jurisdiction of a justice of the peace is to be distinguished from the venue limitations of Art. 2390, R.C.S.

3. See Mancuso v. Taft, 476 F.2d 187, 196-97 n. 14 (1st Cir. 1973).

clause of the Fourteenth Amendment has become irrelevant in considering protection of the right to run and vote for state office. Modern concepts of equal protection have assumed that burden. *Bullock v. Carter*, 405 U.S. 134, 31 L.Ed.2d 92 (1972); *White v. Regester*, ____ U.S.____, 37 L.Ed.2d 314 (1973); *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 16 L.Ed.2d 169 (1966); cf. *Oregon v. Mitchell*, 400 U.S. 112, 27 L.Ed.2d 272 (1970).

Insofar as Art. 2351½ operates to truncate the term of a duly elected public official upon the circumstance that a mere convenience redistricting places him in a district with others, it invidiously and irrationally discriminates between him and others not so affected and between the effect of the votes of those who voted or were entitled to vote in his election and voters whose franchise was not so bobbed. No compelling interest was here served by such discrimination.[4] Certainly it was not necessary to effect redistricting in mid-term or, if that were thought pressing, it was not compelling that the office be declared vacant as a result. Indeed, the analogous section pertaining to county commissioners, Art. 2351½ (b), expressly provides that the term of office of a county commissioner is not to be affected by redistricting, even though its effect may be to place his residence outside the precinct for which he was elected.

4. Defendants' only contention which approaches advancing such an interest for *redistricting* is that the old precincts were egregiously disproportionate in population. This is true, but the new districts were clearly not drawn with any ideal of population equality foremost in mind; the order establishing them itself recites that one contains almost two and one-half times as many people as another. Nor would population equalization, if seen as a compelling reason for redistricting and faithfully served in drawing the new precincts, bear any necessary relation to vacating these offices, a different consideration entirely.

The duly elected justices of the peace and constables, plaintiffs here, are entitled to serve the terms to which they were elected. Insofar only as Article 2351½, Texas Revised Civil Statutes mandates otherwise, it is unconstitutional. Insofar only as defendants' order of January 30, 1973, undertakes to appoint other persons to plaintiffs' offices, and to prevent plaintiffs from carrying out the duties and receiving the emoluments of their offices during the term to which they were elected, it is likewise invalid.

/s/ _____
Thomas Gibbs Gee
United States Circuit Judge

/s/ _____
John V. Singleton, Jr.
United States District Judge

/s/ _____
Carl O. Bue, Jr.
United States District Judge

EXHIBIT C

Article 5, Texas Constitution

§ 18. Division of counties into precincts; election of constable and justice of the peace; county commissioners and county commissioners court

Section 18. Each organized county in the State now or hereafter existing, shall be divided from time to time, for the convenience of the people into precincts, not less than four and not more than eight. Divisions shall be made by the Commissioners Court provided for by this Constitution. In each such precinct there shall be elected one Justice of the Peace and one Constable, each of whom shall hold his office for four years and until his successor shall be elected and qualified; provided that in any precinct in which there may be a city of 8,000 or more inhabitants, there shall be elected two Justices of the Peace. Each county shall in like manner be divided into four commissioners precincts in each of which there shall be elected by the qualified voters thereof one County Commissioner, who shall hold his office for four years and until his successor shall be elected and qualified. The County Commissioners so chosen, with the County Judge as presiding officer, shall compose the County Commissioners Court, which shall exercise such powers and jurisdiction over all county business, as is conferred by this Constitution and the laws of the State, or as may be hereafter prescribed. As amended Nov. 2, 1954.

EXHIBIT D

The population count of the eight justice precincts, before and after the redistricting of June 28, 1973; the population difference between the smallest precinct and the remainder of the precincts after redistricting; a percentage comparison between the smallest precinct in population and the remainder of the precincts in population after redistricting; the area of each precinct in square miles after redistricting; and a percentage comparison between the smallest precinct in square miles and the remainder of the precincts after redistricting, are as follows:

Pct. No.	Population Before	Population After	Population Difference After	Population Percentage Comparison After	Area In Square Miles After	Area Percentage Comparison After
1.	999,424	343,765	197,865	135.5%	66.0	3.8%
2.	436,974	145,960	Base Number	Base Number	88.0	5.0%
3.	111,106	169,959	23,999	16.0%	338.0	19.4%
4.	81,879	175,769	29,809	20.4%	593.0	33.9%
5.	6,966	337,844	191,884	131.4%	399.0	22.8%
6.	8,848	179,971	34,011	23.3%	32.0	1.8%
7.	11,976	238,401	92,411	63.3%	83.0	4.7%
8.	84,739	149,863	3,903	2.6%	150.0	8.6%

* The total population of Harris County, Texas per the 1970 Bureau of the Census Report is 1,741,912 persons.

* The total number of square miles in Harris County, Texas is 1750.

EXHIBIT E

Article 16, Section 14, VERNON'S ANNOTATED TEXAS CONSTITUTION

Section 14. Civil officers; residence; location of offices

Sec. 16. All civil officers shall reside within the State; and all district or county officers within their districts or counties, and shall keep their offices at such places as may be required by law; and failure to comply with this condition shall vacate the office so held.

EXHIBIT F

Art. 2351½. Change in boundaries of commissioners precincts and justice of the peace precincts

(a) Whenever the Commissioners Court changes the boundaries of commissioners precincts or of justice precincts, it may specify in its order a future date, not later than the first day of January following the next general election, on which the changes shall become effective. If an election for any precinct office is held before the effective date of the order, the office shall be filled at the election by the voters of the precinct as it will exist on the effective date of the change in boundaries. A person who has resided within the territory embraced in the new boundaries for the length of time required to be eligible to hold the office shall not be rendered ineligible by virtue of the precinct's not having been in existence for that length of time.

(b) When boundaries of commissioners precincts are changed, the terms of office of the commissioners then in office shall not be affected by such change, and each commissioner shall be entitled to serve for the remainder of the term to which he was elected even though the change in boundaries may have placed his residence outside of the precinct for which he was elected.

(c) When boundaries of justice of the peace precincts are changed, so that existing precincts are altered, new precincts are formed, or former precincts are abolished, if only one previously elected or appointed justice of the peace or constable resides within a precinct as so changed, he shall continue in office as justice or constable of that precinct for the remainder of the term to which he was elected or appointed. If more than one justice or constable

resides within a precinct as so changed, or if none resides therein, the office shall become vacant and the vacancy shall be filled as other vacancies; provided, however, that in precincts having two justices, if two reside therein, both shall continue in office, and if more than two reside therein, both offices shall become vacant.

Added by Acts 1965, 59th Leg., p. 1523, ch. 664, § 1, eff. Aug. 30, 1965.

EXHIBIT G

Article 5, Section 24, VERNON'S ANNOTATED TEXAS CONSTITUTION

Section 24. Removal of County Officers

Sec. 24. County judges, county attorneys, clerks of the district and county courts, justices of the peace, constables and other county officers, may be removed by Judges of the District Court for incompetency, official misconduct, habitual drunkeness, or other causes defined by law, upon the cause therefor being set forth in writing and the finding of its truth by a jury.

EXHIBIT H

Article 5, Section 28, VERNON'S ANNOTATED TEXAS CONSTITUTION

Section 28. Vacancies in judicial offices

> Sec. 28. Vacancies in the office of Judges of the Supreme Court, the Court of Criminal Appeals, the Court of Civil Appeals and District Courts shall be filled by the Governor until the next succeeding general election; and vacancies in the office of County Judge and justices of the peace shall be filled by the Commissioners Court until the next general election for such offices. As amended Aug. 11, 1891, proclamation Sept. 22, 1891.